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IN THE
Supreme Court of the United States

October Term 1994

UNITED STATES,

Appellant,

v.

RAY HAYS, *et al.*,

Appellees.

STATE OF LOUISIANA, *et al.*,

Appellants,

v.

RAY HAYS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF OF THE CONGRESSIONAL BLACK CAUCUS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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INTERESTS OF AMICUS CURIAE

The Congressional Black Caucus (the "Caucus") is composed of all forty African Americans who have been elected to the House of Representatives and, in addition, Carol Mosely Braun of Illinois, a member of the United States Senate. The issue as to how congressional boundaries are drawn in Louisiana and throughout the nation could affect directly twenty or more members of the present Caucus and millions of African Americans and other minorities who reside in the minority-majority districts where the issue has been or may be raised. The Caucus filed an *amicus* brief in the proceedings below.

ARGUMENT

I.

SUMMARY OF ARGUMENT

The Caucus believes that the minority-majority districts in issue in this and related cases are indispensable in the fight for full integration of the American political landscape. Minority-majority districting is only a specific illustration of the more general goal of *all* districting, particularly single-member districting: it is intended to allow the direct representation of numerical minorities whose votes otherwise would be submerged by those of the majority. In the context of American history and contemporary reality, minority-majority districts are often the only way of fully achieving the pluralist aspirations of American politics and remedying the longstanding exclusion of African Americans from full participation in government. Moreover, the use of minority-majority districts, like Louisiana's District Four and the other minority-majority districts represented by members of the Caucus, shows that these districts have not resulted in the harms this Court feared from race-conscious districting; the challenged districts do not segregate voters on the basis of race, and representatives from minority-majority districts fairly represent the interests of *all* their constituents—regardless of race.

This Court's decision in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993), nevertheless has unleashed a torrent of litigation challenging minority-majority congressional districts drawn after the 1990 census. In three cases, lower federal courts have used *Shaw* as a roving warrant to flout Congress's commitment to full integration of the political system. In so doing, these lower courts have disregarded this Court's reluctance to interfere in the intensely political process of districting, which inevitably involves "competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups." *Davis* v. *Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment).

Shaw reflects this Court's hopes and its fears about the American political system. *Shaw* confirms this Nation's deep commitment to integration of the political system. The Fourteenth and Fifteenth Amendments to the Constitution expressly pledge to eradicate the political exclusion of racial minorities, particularly African Americans. *See Shaw*, 113 S. Ct. at 2822-31. This constitutional command underlies the Voting Rights Act of 1965, which gives all Americans an "equal opportunity to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (1988). Moreover, as *Shaw* recognizes, the political system should ensure that elected officials are responsive to the needs of all of their constituents; no official should ignore the distinctive needs of the citizens he or she represents because of their race. *See Shaw*, 113 S. Ct. at 2827. Finally, *Shaw* expresses an aspiration for American politics to become less race-conscious and polarized. *See id.* at 2827, 2832.

At the same time, *Shaw* sets forth several reservations about the deliberate creation of irregularly-shaped, minority-majority districts. *Shaw* foresees two potential dangers in such districts. *First*, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group rather than their constituency as a whole." *Id.* at 2827. *Second*, to the extent that such districts reinforce stereotypes about racial distinctions, they may

"exacerbate...patterns of racial bloc voting," *id.*, and further polarize American politics.

It is the position of the Caucus that the opinion and order of the *Hays* trial court is inconsistent with this Court's opinion in *Shaw*. The lower court failed to recognize that the challenged minority-majority district meets the aspirations for the American political system identified in *Shaw*. Further, the court below failed to assess the fears noted in *Shaw*. Such inquiry would have revealed that Louisiana's District Four does not present either danger. The lower court decision should be reversed. If, however, the Court concludes that the decision below is consistent with or required by *Shaw*, we submit that the *Shaw* decision was "wrongly decided," and should be revised.[1/]

II.

MINORITY-MAJORITY DISTRICTS ARE A CRITICAL TOOL FOR ACHIEVING AN INTEGRATED POLITICAL SYSTEM

For far too long, this nation was unresponsive and often hostile to the needs of its African-American citizens. Prior to Reconstruction, and the passage of the Fourteenth and Fifteenth Amendments to the Constitution, no African American served in Congress. By 1901 (the end of the First Reconstruction), the massive disfranchisement of African-American voters through fraud, intimidation, and a variety of invidiously discriminatory devices (such as poll taxes and literacy tests) had entirely purged Congress of African-American members. From 1901 to 1928, there

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[1/] In *Fullilove* v. *Klutznick*, 448 U.S. 448, 522 (1980), Justice Rehnquist joined Justice Stewart's view that "*Plessy* v. *Ferguson* was wrong when decided." This view has been endorsed by two members of the *Shaw* majority. *See Planned Parenthood* v. *Casey*, 112 S. Ct. 2791, 2813 (1993) ("[W]e think *Plessy* was wrong the day it was decided.") For an argument that *Shaw* was wrongly decided, *see* A. Leon Higginbotham, Jr., G. Clarick & M. David, *Shaw* v. *Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Rev. 1593 (1994).

were no African Americans in Congress; from 1929 to 1944 there was but one. And the voice of Congress's sole African-American representative from 1935 to 1943, Arthur Mitchell of Illinois, was all but silenced by the antagonistic posturing of his white colleagues—some of whom were members of his own party.[2/]

The consequences of the exclusion of African Americans from voting and thus from Congress were painfully visible, even after World War II, as Congress consistently worked to advance the interests of the white majority at the expense of minority groups. Thus, for example, in 1957 southern congressmen almost uniformly joined the "Southern Manifesto," rejecting the doctrine of *Brown* v. *Board of Education* and adhering solely to the interests of those white constituents who wanted to maintain segregation in America—to the detriment of a significant African-American southern population.[3/]

Louisiana's District Four and other challenged minority-majority districts have served to move America beyond this deplorable history and toward the ideal of a representative democracy, one that encourages the inclusion of *all* Americans in political discourse. Progress has been slow in coming. Indeed, only after the 1992 congressional elections did the number of African-American members of Congress rise from 26 to 40. Absent the minority-majority districts that facilitated this change, however,

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[2/] During the Democratic Party convention of 1936: "Congressman Mitchell's presence on the podium...was used as an excuse for a U.S. senator from South Carolina and eight other delegates to stage a walkout in protest. But even that demonstration was mild compared to what had happened in previous conventions...." William L. Clay, *Just Permanent Interests: Black Americans in Congress 1870-1991* 72 (1992).

For a list of African Americans who have served in Congress, *see* Appendix A hereto.

[3/] Nineteen senators and 83 representatives from the South, with approximately 9 million African-American constituents, joined the Manifesto. *See* Norman Dorsen *et al.*, 2 *Political and Civil Rights in the United States* 625 n.2 (4th ed. 1979) (for history of manifesto); George T. Kurian, *Datapedia of the United States: 1790-2000* 18-26 (1994) (for southern population).

America cannot realistically hope soon to achieve a racially integrated legislature that adequately allows for the expression of the experiences and views of *all* Americans. Decisions such as the district court's opinion in this case ignore the crucial importance of achieving a racially integrated legislature in a multiracial nation.

A. The Central Purpose of Single Member Congressional Districts is to Achieve Representation of Minority Groups

Nothing in the Constitution requires congressional representatives to be elected from single-member districts. Nevertheless, single-member districting, which has been required by federal statute since 1842, serves a critical function: the direct representation in Congress of communities with distinct political interests that otherwise would be unrepresented were elections conducted on an at-large basis. Single-member districts promote a diversity of experience, insight and outlook in Congress that both results in better and more representative lawmaking and promotes citizen confidence in the legitimacy of the legislative process.

Single-member congressional districts were first mandated by the Reapportionment Act of 1842. This Act advanced James Madison's notion that single-member districts would best allow for the representation of local communities. As Madison explained in Federalist Paper 56:

> Divide the largest state into ten or twelve districts and it will be found that there will be no peculiar local interest...which will not be within the knowledge of the Representative of that district.

Indeed, the committee forwarding the 1842 Act explicitly intended the single-member districts to enable minorities to have representation in the face of differing majorities. That committee explained:

> [At-large elections] stifl[e] the voice and smother[] the opinions of minorities...thus disfranchised by the overbearing insolence of a majority, always

> meager, and as it grows leaner growing more inexorable and oppressive.

H.R. Rep. 909, 27th Cong., 2d Sess. at 8 (1842).

Thus the overriding purpose of single-district voting is to enhance pluralism in Congress by promoting the grouping and political participation of various communities in American democratic life. Louisiana's District Four and other challenged minority-majority districts advance this purpose, by including the views and protecting the interests of a distinct minority group, African Americans. Only a pluralistic Congress—one that includes the presence of legislators of various backgrounds—can fairly ensure that all appropriate interests are considered, as the government forges policies that dramatically affect the lives of all American citizens, including those who are members of minority groups.

B. Groups Defined by Reference to Religious, Racial, Ethnic, and Socioeconomic Status Form the Building Blocks of Our Pluralist Democracy

As Justice O'Connor recognized in her concurring opinion in *Davis v. Bandemer*, 478 U.S. 109, 147 (1986), the reapportionment process has traditionally involved political accommodation of the "competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups." In the context of America's unique history, it is essential that this Court recognize that African Americans often form a community with distinct political interests.

One key source of African Americans' commonality of interests is, of course, this Nation's lamentable history of overt

racial discrimination.[4/] African Americans were enslaved,[5/] and later denied the rights to purchase property or live in certain areas,[6/] learn,[7/] work,[8/] travel with dignity,[9/] marry,[10/] and

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[4/] *See generally* John Hope Franklin, From Slavery to Freedom (7th ed. 1994); Gunnar Myrdal, *An American Dilemma* (1944).

[5/] *See Dred Scott* v. *Sandford*, 60 U.S. 393, 407 (1857) ("[A]t the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted ... [African Americans] had no rights which the white man was bound to respect."); *see also* A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process* 6 (1978).

[6/] *See Buchanan* v. *Warley*, 245 U.S. 60, 79 (1917) (municipal racial segregation law); *Shelley* v. *Kraemer*, 334 U.S. 1, 20 (1948) (racially restrictive covenant); *see also*, John Hope Franklin, *supra* note 4, at 311; A. Leon Higginbotham, Jr., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 4 Univ. Ill. L. Rev. 763 (1990).

[7/] *See Cumming* v. *Board of Educ.*, 175 U.S. 528, 545 (1899) (Board of Education suspended "temporarily and for economic reasons the high school for colored children"); *Gaines* v. *Canada*, 305 U.S. 337, 352 (1938) (black citizens of Missouri denied the right to attend the only state supported law school); *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954) (racial segregation in public schools); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) (racial segregation in District of Columbia public schools).

[8/] *See Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) (blacks denied membership in labor union on account of race); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944) (racially discriminatory bargaining agreement); *see also* John Hope Franklin, *supra* note 4, at 235.

[9/] Even the one African-American in Congress in the 1930s was denied the right to travel with dignity. As Congressman Arthur Mitchell testified, after he identified himself as a U.S. Congressman to a train conductor in Arkansas, the conductor said "it didn't make a damn bit of difference who I was, that as long as I was a nigger I couldn't ride in [the first class] car." Record of the United States Supreme Court, *Mitchell* v. *ICC*, 313 U.S. 80 (1941) (No. 577), at 79, and *Mitchell* v. *ICC*, 313 U.S. 80, (1941) (denial of "separate but equal" first-class railroad accommodation to African Americans); *see also Plessy* v. *Ferguson*, 163 U.S. 537, 540 (1896) (Louisiana's racial segregation of railroad passengers); *Civil Rights Cases*, 109 U.S. 3 (1883) (same).

vote,[11] simply because of the "color of their skin." *Shaw*, 113 S. Ct. at 2827.

Nor is this legacy ancient history. The continuing effects of this state-sponsored history of slavery, *de jure* segregation, brutality, and exclusion from voting persist. Many middle-aged African Americans attended inferior, racially segregated schools and their substandard educations continue to hamper their ability to compete in the workforce, to afford adequate housing, and to participate effectively in the political process.[12] Even today, white attitudes hardened by state-sponsored *de jure* segregation often result in racially polarized voting and contribute to discrimination in employment, housing, public accommodations, and a variety of other circumstances.

Federal legislation has been an essential weapon in the fight to remedy the effects of this past and continuing racial discrimination, and Congress's use of its Fourteenth and Fifteenth Amendments and Commerce Clause powers to fight for racial justice has been a significant element of the legislative agenda of the past three decades.[13] Of course, Americans of all races have

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[10](...continued)

[10] *See Loving* v. *Virginia*, 388 U.S. 1 (1967) (Virginia's anti-miscegenation statute).

[11] *See Hobbs* v. *Fogg*, 6 Watts 553 (Pa. 1837) (African Americans in Pennsylvania denied the right to vote on account of race); *Giles* v. *Harris*, 189 U.S. 475 (1903) (Alabama Constitution denied African Americans the right to vote on account of race); *see also South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) (setting out history of racial discrimination in voting).

[12] *See* John Hope Franklin, *supra* note 4, at 405-32.

[13] *See* Civil Rights Act of 1964, 18 U.S.C. §§ 372, 2384; 28 U.S.C. §§ 1343, 1443, 1446; 42 U.S.C. §§ 1991 *et seq.* (1988); Equal Employment Opportunity Act, 42 U.S.C. § 2000e *et seq.* (1988); Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* (1988); Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973 *et seq.* (1988); Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.* (1988); Fair Housing Amendments Act of 1988, 28 U.S.C. §§ 2341-2342 (1988); Civil Rights Act of 1991, 5 U.S.C. § 5315; 18 U.S.C. § 241 *et seq.*; 20 U.S.C. §§ 241, 640; (continued...)

supported these remedial measures. Nevertheless, African-American constituents, witnesses, and representatives have been in the forefront of these legislative efforts.

Even beyond explicitly race-conscious legislative measures, African Americans often form discrete communities of interest. Recognition of this thread of shared interests does not involve the type of pernicious stereotyping referred to by this Court in *Shaw*. *See* 113 S. Ct. at 2827. African Americans, enslaved and segregated because of their race, were excluded from the dominant American culture and forced to develop distinct cultural traditions, woven together from the strands of the disparate African traditions of their homelands. The result is indubitably, uniquely, and recognizably African American. It includes the literature of Richard Wright, Ralph Ellison and Toni Morrison, the poetry of Phyllis Wheatley and Langston Hughes and art forms such as blues, gospel and jazz.[14/] African-American culture is also uniquely expressed in painting, sculpture, film and dance. Similar to other ethnic, religious, and occupationally-defined groups, African Americans, who share a common cultural heritage, often share a common perspective on many issues the government faces—ranging from political solidarity with the people of certain foreign countries to support for particular foreign and domestic, economic and cultural policies.

There are numerous examples of how commonality of culture influences American politics. Over the years, Irish-

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[13/](...continued)
28 U.S.C. §§ 1343, 1447, 1861; 42 U.S.C. §§ 1971 *et seq.*, 1973 *et seq.* (1988); Civil Rights Restoration Act of 1991, 20 U.S.C. §§ 1687, 1688; 29 U.S.C. §§ 706, 794; 42 U.S.C. §§ 2000d-4a, 6107 (1988); Comprehensive Anti-Apartheid Act of 1986, 12 U.S.C. § 635; 22 U.S.C. §§ 2151c, 2151n, 2151o, 2346d, 5001 *et seq.* (1988).

[14/] *See generally* 27 *Eighteenth-Century Studies* No. 4, *Special Issue: African-American Culture in the Eighteenth Century* (1994); Talmadge Anderson, *Introduction to African American Studies* 251-82 (1993); Roger D. Abrahams, *Singing the Master: The Emergence of African American Culture in the Plantation South* (1992).

American members of Congress and representatives from constituencies with significant Irish-American populations have developed particular interest and expertise in issues connected with Northern Ireland.[15/] Similarly, Jewish-American legislators and representatives with large numbers of Jewish-American constituents have been especially active in issues involving the Middle East.[16/]

Like these other minority groups, in recent years, members of the Caucus have labored to advance interests of particular concern to African Americans. Caucus members thus have taken a leading role in debating American policy with regard to South Africa and Haiti. For example, the Caucus successfully pressed for a more equitable application of American foreign policy to the Haitian refugee crisis, by bringing to the fore the disparity between the Clinton Administration's policy with respect to the treatment of Cuban and Haitian immigrants. The Caucus's role in such affairs is appropriate and critical.[17/]

[15/] For example, Sen. Edward Kennedy, of Massachusetts, has often spoken out regarding affairs in Northern Ireland. *See, e.g., Dublin Journal: A Kennedy Pleases the Irish, Piques Some Envoys*, N.Y. Times, July 29, 1994, A4; *Political Leader of I.R.A. Begins a Tour of the U.S. in Boston*, N.Y. Times, Sept. 25, 1994, at 13; *Bay State Delegation Arrives in Ireland to Meet Leaders*, The Boston Herald, Dec. 11, 1994, at 2.

[16/] For example, Rep. Charles Schumer, of New York, has regularly promoted favorable relations with Israel. *See, e.g., Baxter International Settles Boycott Case--Firm Fined $6 Million for Aiding Arab League*, Wash. Post, Mar. 26, 1993, at D1.

[17/] *Cf. Haitian Refugee Center, Inc.* v. *Baker*, 112 S. Ct. 1245, 1246 (1992) (Thomas, J., concurring in denial of *certiorari*) (the matter of Haitian refugees "must be addressed by the political branches").

A similar dynamic is evident with regard to female representatives. Last year's debate over whether the naval commander in charge during the infamous "Tailhook Scandal" should be retired at full rank provides an example of the significance of even a small coalition of women: it transformed what otherwise would have been a *pro forma* exchange into a national debate on gender relations. *See* Maureen Dowd, *Senate Approves a 4-Star Rank for Admiral in Tailhook Affair: 54-43 Vote Followed Heated Debate on Floor*, N.Y. Times, Apr. 20, 1994, at

(continued...)

Similarly, on the domestic front, the Congressional Black Caucus worked to raise concerns about the fairness of the recent crime bill. Ultimately, most African-American representatives voted in favor of the bill, even though a Caucus-sponsored amendment concerning racism in death penalty sentencing was defeated.[18/]

But the importance of having a racially integrated Congress in a multi-racial society goes far beyond African-American representatives' decisive role in a few identifiable debates of particular importance to the African-American community. As this Court has repeatedly emphasized in cases involving juries, the very notion of "representativeness" requires that no significant group be excluded from the deliberative process. As Justice Marshall explained in *Peters* v. *Kiff*, 407 U.S. 493, 503 (1972):

> We are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded...the effect is to remove from the...room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury [or Congress] of a perspective on human events

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[17/](...continued)
A1, B10. The further representation of women's interests—by women—in the Senate would no doubt have further altered the tenor and perhaps the outcome of that debate.

[18/] *See The Crime Bill: The Roll Call of the House on the Crime Measure*, N.Y. Times, Aug. 22, 1994, at B6; K. Seelye, *Provision on Racial Bias in Death Sentence Appears Unlikely for Crime Bill*, N.Y. Times, July 14, 1994, at D3.

> that may have unsuspected importance in any case that may be presented.[19/]

Indeed, in *J.E.B.* v. *Alabama*, 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring) (emphasis added), Justice O'Connor recognized that in the context of jury deliberations, "[w]e know that *like race*, gender matters...[j]urors are not expected to come into the jury box and leave behind all that their human experience has taught them." Thus, African-American representatives perform an essential function in the deliberative processes connected with the proposal, assessment and enactment of legislation of all kinds.

Moreover, as the jury cases make clear, an African-American presence may also be essential to public perceptions of congressional legitimacy. *See J.E.B.*, 114 S. Ct. at 1429; *Powers* v. *Ohio*, 499 U.S. 400, 407 (1991) (jury service "ensures continued acceptance of the laws by all of the people"). Again, a foreign policy issue illustrates the point. During the 1991 Gulf War, Congress was faced with the decision whether to commit American forces—forces that are disproportionately black and poor—to combat. The congressional debate regarding the deployment of troops to Iraq was criticized as potentially

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[19/] This Court's frequently cited discussion in *Ballard* v. *United States*, 329 U.S. 187, 193-94 (1946), with respect to juries and gender equally pertains to legislatures and race:

> [I]t is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.

See also Taylor v. *Louisiana*, 419 U.S. 522, 531-32 (1975) (quoting *Ballard*).

illegitimate and unfair precisely because the composition of Congress did not accurately reflect the composition of the community from which the soldiers sent into combat would come.[20] Increasing the number of African-American legislators in Congress is essential to the perceived legitimacy of the decisions that that body makes, particularly those which disproportionately effect the lives of African-American citizens.

Failure to ensure pluralism also limits the input of diverse outlooks in congressional debate, impairing Congress's insight into the problems facing the Nation. Such diverse input is crucial to combating the preconceived notions and unconscious prejudices of legislators. Pluralism thus permits the mutual education of individuals. Minorities learn of the concerns and fears of majorities, while majorities learn of the lives of others and experiences that they may well be unable to imagine. And, we believe, over time, more inclusive legislative bodies will enact laws that will increase integration within society.

Of particular salience to the case before the Court is the fact that the commonalities of African-American culture and political interests permeate the community of Louisiana's African Americans. The political cohesiveness of Louisiana's African-American population has been well documented. *See, e.g., Citizens for a Better Gretna* v. *City of Gretna*, 636 F. Supp. 1113, 1124-26 (E.D. La. 1986), *aff'd*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 492 U.S. 905 (1989); *Major* v. *Treen*, 574 F. Supp. 325, 351 (E.D. La. 1983). It is, of course, no surprise since Louisiana's African-American citizens are disproportionately undereducated,

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[20] As noted by the New York Times:

> Close to 30 percent of the Army's troops in Operation Desert Storm are black, though blacks are just 14 percent of the nation's population between 18 and 24. In a land war, black casualties will be similarly disproportionate. Is it fair? Is it inevitable? Per answers, one must search the soul of American society.

The Killing Fields Aren't Level, N.Y. Times, Jan. 28, 1991, at A2.

living in poverty, unemployed and ill-housed. *See Major*, 574 F. Supp. at 351.

Despite this clear community of interest, the court below refused even to consider the "past and present reality" of the African-American experience. *Thornburg* v. *Gingles*, 478 U.S. 30, 45 (1986). Rather, the trial court endorsed an unprincipled, dualistic standard, recognizing the political cohesiveness of certain white communities but not that of Louisiana's African-American community. The "traditional" ethnic interests of Louisiana's "English-Scotch-Irish" and "Continental French-Spanish-German Roman Catholic" communities, one concurring judge stated, may be used to draw congressional district lines. In that judge's view, these uniformly white communities are entitled to representation precisely because of commonalities of interest arising from their ethnicity, but the interests of Louisiana's African-American community are not entitled to equal recognition or respect.[21/] This distinction—which is not and cannot be explained—turns the Fourteenth Amendment completely on its head. In this view, *only* African Americans are barred from creating districts that empower their community. Other racial, ethnic, and religious groups are entitled to draw such districts. Thus, the original intended beneficiaries of the Fourteenth Amendment—African-American slaves and their descendants—would be punished by that very Act. This is not the law and the Court must unequivocally reject the lower court's infirm logic.

[21/] The trial court insisted that the state, in its two districting attempts, had "classified its citizens along racial lines" and "cut[] across historical and cultural divides." (App. 15) The "traditional" ethnic interests violated were, in the trial court's view, those of the "English-Scotch-Irish," "mainline Protestants," "Continental French-Spanish-German Roman Catholics," and "*sui generic* Creoles." *Hays I*, App. 66; *see also Hays II*, App. 15 (concurring opinion of Shaw, J.) The court recognized African-American traditions only insofar as they are modified by "traditional" religious interest. *Hays I*, App. 66 (recognizing "traditional rural black Protestants" and "South Louisiana black Catholics").

C. Given Present-Day Political Realities, Genuine Integration Requires the Use of Minority-Majority Districts

As we have already pointed out, between the end of Reconstruction and the passage of the Voting Rights Act, Congress, like most other American institutions, was racially segregated. African Americans were almost entirely excluded. Moreover, as this Court recognized in *Shaw*, the formal enfranchisement of African Americans after 1965 did not actually remedy continued African-American exclusion from the halls of government. *See Shaw*, 113 S. Ct. at 2823; *see also Thornburg* v. *Gingles*, 478 U.S. 30 (1986); *Johnson* v. *De Grandy*, 114 S. Ct. 2647 (1994). Districting practices interacted with racial bloc voting to dilute the voting strength of African-American voters residing within majority-white districts.

As *Shaw* recognized, all districting is race-conscious "in that the legislature is always *aware* of race when it draws district lines...." 113 S. Ct. at 2826. As the State explains in its brief, there are no dispositive districting criteria that require one set of districts be chosen over all other possible plans. Thus, absent minority-majority districts, it is statistically unlikely that even a few, if any, minority-majority districts would be created.[22/] And the brutal truth of contemporary American politics is that, absent minority-majority districts, African-American representation would virtually disappear from Congress. There are 40 African-American members of the House of Representatives. Only two were elected from majority-white districts. Not a single African-American representative from the Deep South states covered by Section 5 of the Voting Rights Act was elected from a majority-white district.

[22/] This point is not undermined by the statement in *Wright* v. *Rockefeller*, 376 U.S. 52, 56-58 (1964), relied on by this Court in *Shaw*, 113 S. Ct. at 2826, that it would have been difficult to draw congressional districts in Manhattan without "concentrations of nonwhite voters." While it might have been difficult to create four districts with equal proportions of nonwhite voters, it would have been entirely possible to create four districts all of which had a white majority.

This pervasive phenomenon describes state legislative elections as well. A recent exhaustive scholarly study of the impact of the Voting Rights Act showed that during the 1980's only *one percent* of majority-white southern state legislative districts elected African American representatives. By contrast roughly a quarter of African-American majority districts elected white representatives.[23/]

Louisiana is no exception to this lamentable pattern of racial bloc voting.[24/] Indeed, Louisiana provides a textbook

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[23/] *See* Lisa Handley & Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations" in *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*, at 335, 345 (C. Davidson & B. Grofman eds. 1994).

The absence of African-American representatives from majority-white districts cannot be ascribed to the placement of all African-American voters in minority-majority districts. A significant number of African-American voters live in majority-white districts, *see id.* at 338, but such districts nonetheless elected only white representatives almost without exception, *see id.*

[24/] The prevalence of racial bloc voting in Louisiana is the latest manifestation of Louisiana's centuries-long effort to disfranchise African Americans. Louisiana's modern history of disfranchising African Americans commenced soon after Reconstruction, galvanized by the fact that African Americans constituted more than 44% of Louisiana's registered voters. *See* R. Engstrom *et al.*, "Louisiana," in *Quiet Revolution in the South*, 104 (C. Davidson & B. Grofman eds. 1994). By the close of the century, direct prohibitions on black voting (including literacy and property tests) were firmly ensconced in Louisiana's laws, after a constitutional convention, the purpose of which was "to establish the supremacy of the white race." *United States* v. *Louisiana*, 225 F. Supp. 353, 371 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

By 1900, voter registration among African Americans in Louisiana had tumbled from 130,344 to 5,320, which represented just four percent of Louisiana's registered voters. By 1910, African-American registration had further plummeted to a mere *730 voters*. *Id.* at 374. This exclusion continued throughout the first half of the century. On the eve of the adoption of the Voting Rights Act in 1965, African Americans represented only 13.7% of registered voters in Louisiana although they were more than 30% of the state's population. *See* Engstrom, *supra*, at 134 (Table 4.1).

example of the necessity of race-conscious minority-majority districting to achieve integration of the political process. One study, a 1988 comparative analysis of southern legislatures and congressional delegations, found that no African-American state legislator was elected from a white-majority district in Louisiana.[25/] Another study looked at city councils in Louisiana cities that had more than 2500 residents and whose voting-age population was more than 10% African American. Only four percent of the representatives elected from white-majority districts were African-American; by contrast 98% of those elected from African-American districts were African American.[26/]

Three recent major state-wide elections demonstrate that race is still the driving force in Louisiana politics. In two races—first for U.S. Senate and then for governor—white supremacist David Duke ran disturbingly successful campaigns based implicitly, if not explicitly, on the resurgence of white supremacy. In both elections Duke's racist views were well-publicized; in both elections, Duke garnered nearly 60% of the white vote.[27/] In March 1994 Marc Morial, an African-American state senator, was elected Mayor of New Orleans against David Mintz, after a race dominated by allegations that the Mintz campaign had distributed

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[25/] *See* Handley & Grofman, *supra* note 23, at 338, 346 (Tables 11.3, 11.4).

[26/] *See* Engstrom, *supra* note 24, at 103, 132.

[27/] *See* J. Wardlaw, *Johnson Beats Duke for Senate*, New Orleans Times-Picayune, Oct. 7, 1990, at A1 (reporting election for Senate); J. Wardlaw, *It's Edwards—Heavy Voter Turnout Buries Duke*, New Orleans Times-Picayune, Nov. 17, 1991, at A1.

Notably, when the court below imposed its own, judicially-invented apportionment plan on the State of Louisiana, David Duke crowed that one of the plan's districts was "tailor made" for his candidacy. *See* Elaine Jones, *In Peril: Black Lawmakers*, N.Y. Times, Sept. 11, 1994, Sec. IV. at 19.

anonymous fliers attacking black people.[28] Morial received 91% of the black vote, while Mintz received 90% of the white vote.[29]

The bottom line is this: from our own experience, the members of the Caucus have seen the tangible and intangible differences the presence of substantial numbers of African Americans make in the work of Congress. We also know, as practical politicians aware of the voting behavior of citizens inside and outside our districts, that minority-majority districts are the only way of providing African-American voters with an opportunity to elect the representatives of their choice. Thus, if the American political system is to achieve real integration at all levels of the political process while continuing to use single-member districts to elect congressional representatives, race-conscious minority-majority districts are essential.

III.

MINORITY-MAJORITY DISTRICTS LIKE LOUISIANA'S DISTRICT FOUR NEITHER SEGREGATE VOTERS NOR IMPAIR FULL REPRESENTATION OF ALL CONSTITUENTS' INTERESTS

Shaw identified several potential dangers that the deliberate creation of "bizarre," "highly irregular" or "tortured" minority-majority districts might cause. *See Shaw*, 113 S. Ct. at 2825-27. For the reasons set out at length in the State's brief, the Caucus believes that Louisiana's District Four does not fall within this suspect category; that district adheres to many traditional districting criteria and is no more irregular or bizarre than past Louisiana

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[28] R. Theim, *It's Morial! Sweeping Victory Caps Dirty Campaign*, New Orleans Times-Picayune, March 6, 1994, at A1.

[29] C. Warner, *Racial Concerns Swung Key Voters*, New Orleans Times-Picayune, March 6, 1994, at A1. Although Morial's victory may forward the cause of African Americans in New Orleans, the extreme racial polarization of the electorate does not portend the entrance of blacks into the mainstream of Louisiana politics.

congressional districts. Nevertheless, an assessment of the fears noted by the *Shaw* Court—an assessment all but abandoned by the court below—reveals that Louisiana's District Four does not foster any detrimental result.

Shaw's use of the word "segregate" makes clear the Court's concern that race-conscious districting may somehow separate voters by race and limit voters' decisions about whom to support and how to conduct their everyday affairs, as well as affect public officials' behavior after an election is over. The Caucus submits that, under current conditions, neither Louisiana's District Four nor the other minority-majority districts challenged in the wake of *Shaw* in fact give rise to the potential harms hypothesized by the Court.

A. Contrary to the Suggestion of Segregation, the Challenged Congressional Districts Are Among the Most Racially Integrated Districts in the Nation

Large numbers of whites and African Americans live in racially segregated neighborhoods. This neighborhood-level segregation is the product of many factors, including past and present racial discrimination, as well as varying economic opportunity. Not surprisingly, then, many congressional districts are racially segregated. Their populations are either overwhelmingly white, African American or Hispanic.[30/] Ironically, neither this nor any other pending voting rights case has challenged the legality of these districts based on their segregated characteristics.

Rather, districts such as Louisiana's District Four are under siege. District Four, and the other challenged minority-majority districts, however, are among the *least* segregated districts in the

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[30/] For example, 28 congressional districts in the South are more than 90% non-Hispanic white. *See* David Bositis, *Redistricting and Representation: The Creation of Majority-Minority Districts in the South, The Evolving Party System and Some Observations on the New Political Order* 26 (The Joint Center for Political and Economic Studies 1994).

Nation. Unlike the vast majority of congressional districts, these districts are racially diverse rather than homogeneous. Indeed, while the trial court concluded that District Four "[s]eparate[s]... [d]ivide[s]...[and] [s]egregate[s]," *Hays II*, App. 11, Louisiana's African-American citizens from other citizens, in truth the district is characterized by a significant degree of racial integration. Only slightly more than half of that district's voters—55% - are African American, while 45% are white. Further, as the trial court noted, Louisiana boasts a large African-American population dispersed across the state, the majority of whom live outside of District Four.[31/]

Other challenged districts are no less integrated. North Carolina's Districts One and Twelve, both maligned as segregated, are similarly integrated, each with voting age populations of approximately 53% African American, 46% white and 1% Hispanic. Texas' District Eighteen is a coalition of voters: 49% African American, 37% white and 14% Hispanic, and District Thirty is similarly integrated. The distribution of the voting-age residents of Georgia's Eleventh District is 60% African American, 39% white and 1% Hispanic. When these districts are compared to some of their white-majority counterparts, such as North Carolina's Fifth, which is 85% white, or Texas's Fourth, which is 89% white, or Georgia's Ninth, *which is 94.9% white*, the integrated nature of these districts and of District Four is clear.[32/]

[31/] The trial court's plan created a minority-majority district in southern Louisiana, centered around New Orleans. The suggestion that that district, although it has a similar ethnic distribution as District Four, is not segregated simply because of its regular boundaries, is logically insupportable.

[32/] *See* Higginbotham *et al.*, *supra* note 1, at 1653-57 Apps. E & F (for racial composition of southern congressional districts).

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The very language of the lower court in this case used to *condemn* the Fourth District in fact illustrates its integrated character:

> District 4 includes North Louisiana English-Scotch-Irish, mainline Protestants, South Louisiana French-Spanish-German Roman Catholics, traditional rural black Protestants, and Creoles. The district encompasses North, Central, and South Louisiana, each of which has its own unique identity, interests, culture, and history. The agricultural regions of District 4 include cotton, soybean, rice, sugar cane, timber.

Hays II, App. 15–16 (concurring opinion). In light of this characterization, how could the district court have concluded that District Four is segregated? How could it defend the districting plan it drew, in which six of seven districts have a substantial white majority? The district court's answer appears chilling: *districts that have even the slightest majority of African Americans are segregated, while white-majority districts are integrated.* This Court must unequivocally reject this pernicious view.

Far from increasing segregation within the political process, the challenged minority-majority districts are integrated. Further, there is no danger that these districts will cause racial segregation. As an empirical matter, citizens simply do not choose where to live based on congressional district lines. *See Shaw* v. *Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994). Thus, the Voting Rights Act and reapportionment more generally will not affect residential patterns. Minority-majority districts, in other words, do not exacerbate existing segregated residential patterns. Contrary to Judge Walter's charge that districts like the Louisiana Fourth "say now: 'Separate!' 'Divide!' 'Segregate!'," *Hays II*, App. 11, these districts bring together African-American and white voters and do nothing more than recognize that, at the neighborhood level, Louisiana, like many other states, is *already* separated and segregated, and Louisiana voting patterns are already divided along racial lines.

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B. The Representatives Elected From the Challenged Districts Faithfully Represent the Interests of All Their Constituents

The other danger this Court identified in *Shaw* was that representatives elected from "bizarre" minority-majority districts might ignore the needs of constituents who are not members of the racial majority within their districts. Given legislators' inevitable awareness of the racial composition of their districts, *see Shaw*, 113 S. Ct. at 2826, however, this danger obviously exists regardless of the shape of the district that elected them, the racial component of the majority, and the race of the elected representative. Surely this Court does not suppose that African-American representatives from minority-majority districts are inherently less likely than their white counterparts to represent all their constituents fairly.[33]

In fact, members of the Caucus represent *all* the residents of their districts, whatever their race. Our doors are always open to all constituents.[34] We perform the traditional constituent service functions with the same vigor for white constituents as we do for African-American constituents. We also zealously represent the geographically defined interests of our districts—for instance, the needs of particular employers or industries.

Moreover, it would be illogical to conclude that the representatives elected from the Louisiana's District Four or other minority-majority districts pursue only a "racial agenda." Congressional representatives have voting responsibility on a wide range of

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[33] The implication that white representatives elected from white-majority districts can adequately and fairly represent the interests of their minority constituents, but that African Americans or other minorities cannot represent the interests of white constituents, is indefensible. In fact, this nation's experience has been to the contrary: for centuries many white legislators at all levels of government acted against the interests of their African-American constituents.

[34] Compare *Jeffers* v. *Clinton*, 730 F. Supp. 196, 214 (E.D. Ark. 1989) (white state legislators in Arkansas sent black constituents from their own districts to seek assistance from African-American representatives elected from other districts), *aff'd*, 498 U.S. 1019 (1991) .

issues. While some of those issues, such as health care, crime control and welfare reform, are issues about which African Americans have strong concerns, solutions to these issues are not approached on the basis of race. Indeed, by all assessments, the African-American representatives of the 103rd Congress acted ably and fairly to represent the interests of all of their constituents.[35/]

C. Minority-Majority Districts Do Not Increase Racial Polarization

Nothing in the record in this case or in any of the other cases that have followed *Shaw* has provided even the slightest empirical support for the proposition that race-conscious districting has increased the levels of racial-bloc voting within minority-majority districts. Indeed, our experience suggests the contrary with regard to the attitudes of white voters. Familiarity with black elected officials, breeds content, not contempt: white voters are far *more* likely to vote for African-American incumbents than they are for African Americans seeking open seats.

The reasons, as the previous section of this brief suggests, are not hard to fathom. Our constituent service, our championship of the diverse interests of our districts' citizens, and our fidelity to the public interest show our white constituents that African-American elected officials will represent them fairly and diligently. Thus, virtually *all* of us have received increased support from the white community over time. If anything, then, our districts have decreased the levels of racial polarization or balkanization in American society.

CONCLUSION

This case raises fundamental issues concerning our representative democracy. To forge their view of American democracy, appellees conjure a utopia—a color-blind society—where an individual's race has little impact on his or her life, where the race of a candidate for political office does not influence

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[35/] *See* Bositis, *supra* note 30, at 29-30.

citizens' voting behavior and where African Americans do not have shared political interests simply because of the color of their skin. This is our dream too. As the poet Langston Hughes eloquently wrote:

> I dream a world where all
> Will know sweet freedom's way
> Where greed no longer saps the soul
> Nor avarice blights our day
> A world I dream where black or white,
> Whatever race you be,
> Will share the bounties of the earth
> And every man is free.[36]

But this dream cannot substitute for reality in interpreting the Constitution today, at a time when the United States has not yet attained this hopeful vision. The realities are that race matters; that voting is racially polarized; that the color of a candidate's skin does affect voting; that many African Americans do have shared political interests. In light of these realities, the necessity of minority-majority districting to render our democracy representative is compelling.

The *Hays* Court abdicated its responsibility to ground its legal analysis in the racial realities of the Nation today. This Court should reject the conclusions of the court below, which are in conflict with the realities of racial bloc voting and African-American exclusion from the political process, as well as the rules laid down in *Shaw*.

From 1877 to 1991, no African American from Louisiana served in the United States Congress. Louisiana's post-1990 reapportionment represents the state's good-faith effort to remedy its tragic history of racial exclusion. Now, for the first time in the state's history, Louisiana has a truly integrated congressional delegation that fairly reflects the state's racial diversity. Two

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[36] L. Hughes, "I Dream a World," in *American Negro Poetry* 71-72 (A. Bontemps ed., 1963).

African Americans now serve; each represents a racially integrated district.

This Court should not sanction efforts to turn the clock back to the days of a lily-white legislature governing a diverse nation. This Court should emphatically reject the theory that a 55% African-American constituency—like the challenged Louisiana Fourth District—is segregated while an 80% white district—like the one dictated by the court below—is not. Thus, this Court should reverse the judgment of the district court and hold that states have the power to ensure the equal opportunity of African-American citizens to participate in all levels of a pluralist political process.

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Respectfully submitted,

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APPENDIX A

APPENDIX A:

AFRICAN-AMERICANS IN THE U.S. CONGRESS, 1870-1995

Member	Party-State	Years
Hiram R. Revels	R-MS	1870-71
Blanche K. Bruce	R-MS	1875-81
Edward W. Brooke	R-MA	1967-79
Carol Moseley-Braun	D-IL	1993-
United States House of Representatives		
Joseph H. Rainey	R-SC	1870-79
Jefferson F. Long	R-GA	1870-71
Robert B. Elliot	R-SC	1871-74
Robert C. De Large	R-SC	1871-73
Benjamin S. Turner	R-AL	1871-73
Josiah T. Walls	R-FL	1871-73
Richard H. Cain	R-SC	1873-75
		1877-79
John R. Lynch	R-MS	1873-77
		1882-83
James T. Rapier	R-AL	1873-75
Alonzo J. Ransier	R-SC	1873-75
Jeremiah Haralson	R-AL	1875-77
John A. Hyman	R-NC	1875-77
Charles E. Nash	R-LA	1875-77
Robert Smalls	R-SC	1975-79
James E. O'Hara	R-NC	1883-87
Henry P. Cheatham	R-NC	1889-93
John M. Langston	R-VA	1890-91

Member	Party-State	Years
Thomas E. Miller	R-SC	1890-91
George W. Murray	R-SC	1893-95
		1896-97
George W. White	R-NC	1897-1901
Oscar DePriest	R-IL	1929-35
Arthur W. Mitchell	D-IL	1935-43
William L. Dawson	D-IL	1943-70
Adam C. Powell, Jr.	D-NY	1945-67
		1969-71
Charles C. Diggs, Jr.	D-MI	1955-80
Robert N.C. Nix	D-PA	1958-78
Augustus F. Hawkins	D-CA	1963-90
John Conyers, Jr.	D-MI	1965-
William L. Clay	D-MO	1969-
Louis Stokes	D-OH	1969-
Shirley A. Chisholm	D-NY	1969-82
George W. Collins	D-IL	1970-72
Ronald V. Dellums	D-CA	1971-
Ralph H. Metcalfe	D-IL	1971-78
Parren H. Mitchell	D-MD	1971-86
Charles B. Rangel	D-NY	1971-
Walter E. Fauntroy	D-D.C.	1971-90
Yvonne B. Burke	D-CA	1973-79
Cardiss Collins	D-IL	1973-
Barbara C. Jordan	D-TX	1973-78
Andrew J. Young	D-GA	1973-77
Harold E. Ford	D-TN	1975-
Bennett M. Steward	D-IL	1979-80
Julian C. Dixon	D-CA	1979-
William H. Gray	D-PA	1979-91
Mickey Leland	D-TX	1979-89
Melvin Evans	R-V.I.	1979-80
George W. Crockett, Jr.	D-MI	1980-90
Mervyn M. Dymally	D-CA	1981-92

Member	Party-State	Years
Gus Savage	D-IL	1981-92
Harold Washington	D-IL	1981-83
Katie B. Hall	D-IN	1982-84
Major R. Owens	D-NY	1983-
Edolphus Towns	D-NY	1983-
Alan Wheat	D-MO	1983-94
Charles A. Hayes	D-IL	1983-92
Alton R. Waldon, Jr.	D-NY	1986-87
Mike Espy	D-MS	1987-93
Floyd H. Flake	D-NY	1987-
John Lewis	D-GA	1987-
Kweisi Mfume	D-MD	1987-
Donald M. Payne	D-NJ	1989-
Craig A. Washington	D-TX	1989-84
Barbara R. Collins	D-MI	1991-
Gary A. Franks	R-CT	1991-
William J. Jefferson	D-LA	1991-
Eleanor H. Norton	D-D.C.	1991-
Maxine Waters	D-CA	1991-
Lucien E. Blackwell	D-PA	1991-94
Sanford Bishop	D-GA	1993-
Corrine Brown	D-FL	1993-
Eva M. Clayton	D-NC	1993-
James E. Clyburn	D-SC	1993-
Cleo Fields	D-LA	1993-
Alcee L. Hastings	D-FL	1993-
Earl F. Hillard	D-AL	1993-
Eddie B. Johnson	D-TX	1993-
Cynthia McKinney	D-GA	1993-
Carrie Meek	D-FL	1993-
Mel Reynolds	D-IL	1993-
Bobby L. Rush	D-IL	1993-
Robert C. Scott	D-VA	1993-
Walter R. Tucker, III	D-CA	1993-

Member	Party-State	Years
Melvin Watt	D-NC	1993-
Albert R. Wynn	D-MD	1993-
Bennie G. Thompson	D-MS	1993-
Sheila Jackson Lee	D-TX	1995-
Chaka Fattah	D-PA	1995-
Victor O. Frazer	I-V.I.	1995-
J.C. Watts	R-OK	1995-